

The jurisdiction of the Appeals Board to review preliminary hearing orders entered pursuant to K.S.A. 1997 Supp. 44-534a is limited to issues involving the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. See K.S.A. 1997 Supp. 44-551(b)(2)(A). "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review

by the board.” K.S.A. 1997 Supp. 44-534a(a)(2). Accordingly, for the Appeals Board to determine whether it has jurisdiction to review an appeal from a preliminary hearing order it is incumbent upon the administrative law judge to state the basis for his or her denial of preliminary benefits. Here the Special Administrative Law Judge did not do so in his Order, but the parties agree and the transcript confirms that the Special Administrative Law Judge based his denial of benefits upon a finding that claimant failed to prove she gave notice of accident to the employer within 10 days, and claimant failed to establish just cause for her failure to give said notice as required by K.S.A. 44-520. The Special Administrative Law Judge also decided the issues of injury by accident and whether the claimant’s injury arose out of and in the course of her employment with respondent on the date alleged. Those issues were raised by respondent but, because of the Board’s ruling on notice, those issues will not be addressed by the Board. The issue raised by claimant as to notice is subject to review on an appeal from a preliminary hearing order.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer’s duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer’s duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant initially alleged she was injured on Friday, November 7, 1997. While unloading a truck, she was pushing a cart down a ramp when it tipped. She twisted her knee and experienced immediate pain. In claimant’s brief to the Appeals Board, however, the claimant alleged she was injured on November 8, 1997. There is considerable doubt concerning the accident and the date of accident. But, for the purpose of determining whether claimant gave timely notice of accident, the Appeals Board will adopt this new date of accident alleged by claimant.

The parties do not agree that notice was given within 75 days. That is an issue along with whether claimant gave notice within 10 days. Claimant argues just cause was

established if the Board finds the claimant failed to give notice within 10 days. This issue turns primarily upon the question of the claimant's credibility. Claimant alleges that she informed Dennis Anderson of her injury that day but that he simply walked away. Claimant now admits that she couldn't have given Mr. Anderson notice at closing on Friday, November 7, 1997, because she didn't work until closing that day. She now alleges it must have been on Saturday, November 8, 1997. Conversely, if claimant's testimony that she gave notice on the accident date is not believed, then the fact finder is asked to believe that claimant did not realize she was required to report on-the-job accidents and then must decide whether that constitutes just cause.

Claimant has been employed with respondent since January 1997. Her job did not usually require her to unload trucks. Claimant testified she experienced an onset of pain in her left knee, described as a little pain initially, and followed by stiffness and swelling. Claimant alleges she told her supervisor around 9:00 p.m. when they were getting ready to close that her knee hurt. Claimant testified she went shopping the next day. But when she was shown her time card showing when she worked, she changed her testimony. Although claimant testified that she told Mr. Anderson her knee hurt, claimant also admits that she did not inform him that the knee injury was work related. Also, when she initially reported the condition to the emergency room physician, she was not sure as to the cause of her injury and did not report it was from work. Mr. Anderson testified that he was told by claimant that it had happened at home.

The claimant's preliminary hearing testimony contains other contradictions. On cross-examination, after claimant repeated her direct testimony that she told her supervisor at closing time on the day of the accident about her knee, claimant then changed her story and said that she did not. Likewise, she changed her testimony on direct and admitted that when she called on the Monday and Wednesday following her injury and spoke to Harry Ferguson, she did not tell him the injury was work related. It was not until January 26, 1998, that claimant called her employer and notified them her injury was due to a work-related accident. This was 79 days after November 8, 1997.

Claimant did not give respondent notice within 75 days, which is the longest time period permitted by statute for the giving of notice where just cause has been established. The Special Administrative Law Judge found that just cause was not shown for claimant's failure to give her employer notice of accident within 10 days. Claimant alleges there was just cause based upon claimant's lack of knowledge that she must report work-related accidents. However, claimant also alleges she reported her injury to her supervisor the same day. Furthermore, she testified that she knew that it was, in fact, a work-related injury. Nevertheless, claimant waited beyond the 75 days to impart this information to her employer. Thus, claimant had knowledge of a work-related injury within 10 days of its occurrence but did not communicate this information to her employer within 75 days as required by statute.

Accordingly, based upon the record as it currently exists, claimant has failed in her burden to prove timely notice was given pursuant to K.S.A. 44-520. The Order Denying Compensation of the Special Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Compensation entered by Special Administrative Law Judge William F. Morrissey dated April 28, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Mark E. McFarland, Garden City, KS
Eric T. Lanham, Kansas City, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director